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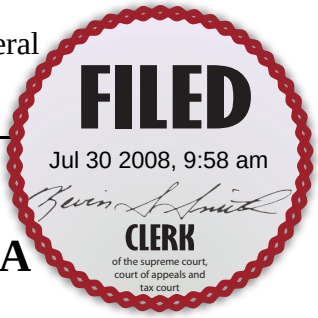

IN THE COURT OF APPEALS OF INDIANA

JAMES PHILLIPS,	)	
	)	
Appellant/Defendant,	)	
	)	
vs.	)	No. 49A02-0801-CR-30
	)	
STATE OF INDIANA,	)	
	)	
Appellee/Plaintiff,	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Grant Hawkins, Judge
Cause No. 49G05-0605-MR-87631

July 30. 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Defendant James Phillips appeals from his conviction of and sentence for Murder, a felony.[1] Phillips contends that his conviction is supported by insufficient evidence, he was denied due process, and his sentence is inappropriate in light of the nature of his offense and his character. We affirm.

FACTS

Between 12:00 and 12:30 p.m. on May 13, 2006, James Phillips took Ann Perdue and their four-year-old daughter to a hospital so that his daughter could receive treatment for ringworm. Phillips and Ann had one daughter together, and Phillips also assisted in raising Ann's other daughter. After leaving the hospital, Phillips eventually left Ann and their daughter at the townhome of Peril Hall, one of Ann's sisters, at approximately 2:00 p.m.

Phillips returned to the townhome later that afternoon and, through the door, asked Terry Perdue, one of Ann's brothers, if he could see his children. At Ann's request, Terry told Phillips that she was not there. Later, Phillips spoke with Terry twice on the telephone, and Terry again told him that Ann was not there. Terry left the townhome between 3:00 and 4:00 p.m. and had no further contact with Phillips.

At some time between 7:00 and 9:00 p.m., Leona Perdue, Ann's mother, and Bo Hall, another one of Ann's sisters, arrived at the townhome. As the duo approached the townhome, they saw Phillips walking toward them. Phillips did not respond to Leona's greeting, and Leona and Bo went inside. Approximately twenty minutes later, Phillips began

[1] Ind. Code § 35-42-1-1 (2005).

"banging" on the door, demanding to be let in, and Leona told him to leave or that she would contact the police. Tr. p. 119.

Throughout the afternoon and evening, Phillips telephoned Peril several times, and she told him at least twice that Ann was not home. During one call, Phillips threatened to kill Peril. At some point, Peril telephoned family friend James Pollard and asked if she could borrow his car so that she could pick up her boyfriend Michael McGee. At some time between approximately 8:50 and 9:15 p.m., Pollard arrived and picked up Peril. Phillips walked over to the car and spoke with Pollard. When Peril asked Phillips why he was "lurking" around her apartments, he claimed that "he had family over there" and denied that he was "lurking." Tr. p. 177. Peril left Pollard at home, drove to McGee's home and collected him, returned to Pollard's, and the trio finally returned to Peril's townhome. At approximately 10:35 p.m., Pollard parked in front of Peril's townhome, and, as he walked toward it, Phillips approached and shot him three times, killing him.

On May 16, 2006, the State charged Phillips with murder. During Phillips's bench trial, the defense strategy was to attack the identification testimony of Hall and McGee, through both cross-examination and argument. Phillips's trial counsels did not introduce any evidence and did not argue that his killing of Pollard was done in sudden heat and therefore constituted voluntary manslaughter. The trial court found Phillips guilty as charged, making the following statement on the record:

> When you hear evidence in a trial you don't always know where you're being led. The subtext of the evidence I was hearing was that Mr. Phillips, whether for legitimate reasons or not, wanted to see his children after returning from the hospital with one of them. And he had every reason to believe that

> everybody he was talking to was lying to him. She's not here, the child isn't here. And so the subtext I was hearing was frustration, anger, I wondered if we were heading towards a sudden heat situation. But sudden heat requires a bit of a time nexus and I don't know the time between what could be considered the last triggering act and the shooting. And you never know if those times are cooling off periods or further incendiary. I have no problem with identification, Mr. Pumphrey[2]…. Point is that a number of people with no real reason to not tell the truth tell us your client was around there most of the day. Getting agitated by them. But at the time of the shooting evidence is that the shooting was knowing and the evidence is also that it was not in a sudden heat, so I'll find your client guilty as charged of murder.

Tr. p. 236-37.

On December 6, 2007, at Phillips's sentencing hearing, the trial judge made the following comments:

> And I am convinced that you pulled the trigger. I'm equally convinced that people out there were doing what they could to get you upset, or they didn't care that what they were doing was getting you upset and making you more upset. If there had been an argument for voluntary manslaughter, [deputy prosecutor], you might have been hard-pressed to respond to it favorably. But it wasn't made so I'm satisfied with my finding as charged.

Tr. pp. 257-58. The trial court found Phillips's criminal history to be a "mild" aggravating circumstance and the circumstances giving rise to the murder to be mitigating. Tr. p. 258. The trial court found that the mitigating circumstance outweighed the aggravating and sentenced Phillips to fifty years of incarceration.

DISCUSSION AND DECISION

I. Sufficiency of the Evidence

Phillips contends that the State failed to establish that he was the person who shot and killed Pollard. Our standard of review for challenges to the sufficiency of the evidence

[2] A Mr. Pumphrey served as one of Phillips's trial counsels.

supporting a criminal conviction is well-settled:

> In reviewing a sufficiency of the evidence claim, the Court neither reweighs the evidence nor assesses the credibility of the witnesses. We look to the evidence most favorable to the verdict and reasonable inferences drawn therefrom. We will affirm the conviction if there is probative evidence from which a reasonable [finder of fact] could have found Defendant guilty beyond a reasonable doubt.

Vitek v. State, 750 N.E.2d 346, 352 (Ind. 2001) (citations omitted). Although Peril and McGee both positively identified Phillips as Pollard's assailant at trial, Phillips claims that inconsistencies between their testimony and earlier statements renders the testimony inherently incredible. This claim, however, is merely an invitation to reweigh the evidence, which we will not do. The trial court was the sole judge of the credibility of Peril and McGee, and it found them credible. The State produced sufficient evidence to establish that Phillips was the person who killed Pollard.

II. Denial of Due Process Claim

Phillips contends that he was denied due process when the trial court found him guilty of murder after it allegedly found that he had acted in sudden heat, which would have mitigated his conviction to one for voluntary manslaughter. "A person who … knowingly or intentionally kills another human being … commits murder, a felony." Ind. Code § 35-42-1-1. However, "[a] person who knowingly or intentionally … kills another human being … while acting under sudden heat commits voluntary manslaughter, … a Class A felony if it is committed by means of a deadly weapon." Ind. Code § 35-42-1-3 (2005).

> Killing in the sudden heat of passion is the element that distinguishes voluntary manslaughter from murder, but there must be sufficient provocation to induce such passion to render the defendant incapable of cool reflection.

> Therefore, the evidence of anger alone does not support giving the instruction on voluntary manslaughter. Additionally, words alone cannot constitute sufficient provocation to give rise to a finding of sudden heat warranting an instruction on voluntary manslaughter.

Matheney v. State, 583 N.E.2d 1202, 1205 (Ind. 1992) (citations omitted). "This is especially true when the 'words' at issue are not intentionally designed to provoke the defendant, such as fighting words." *Allen v. State*, 716 N.E.2d 449, 452-53 (Ind. 1999) (quoting *Stevens v. State*, 691 N.E.2d 412, 426 (Ind. 1997)).[3] In addition to provocation, sudden heat has a temporal dimension as well, in that it cannot exist if sufficient time, under the circumstances of the case, has passed following a provocation for an ordinary person's passions to cool. *Harrington v. State*, 584 N.E.2d 558, 563 (Ind. 1992). The question is not whether the defendant did, in fact, "cool off[,]" but, rather, whether an ordinary person would have. *Id.*

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[3] Although it seems to us entirely possible that words might, under certain circumstances, be provocative enough to render an ordinary person incapable of cool reflection, they cannot, as a matter of law, give rise to sudden heat. The Indiana Supreme Court laid this particular rule down over 160 years ago, and we see no indication that Indiana courts have wavered in their adherence to it.

> [N]o gestures or words of affront, however well calculated to arouse a just indignation, however furious the passion which they may actually excite, are an adequate provocation to alleviate homicide, effected by a deadly weapon, from murder to manslaughter. To have that effect, the provocation must consist of personal violence. Whether this rule be wise, whether it be the best which can be devised to guard human life from brutal rage, and at the same time to palliate human frailty, is not for us to say. We imagine, however, that society would be no gainer by substituting in its place a fluctuating principle, by which each man shall be judged according to the excitement natural to his peculiar temperament, when aroused by real or fancied insult given by words alone.

Beauchamp v. State, 6 Blackf. 299, 310 (Ind. 1842).

Beauchamp's requirement of personal violence notwithstanding, it seems likely that Indiana courts would accept that some other actions could be provocative enough to induce sudden heat, should the question ever arise. For example, Indiana might well adopt the prevailing rule that discovery of one's spouse *in flagrante delicto* with a paramour is sufficient provocation to induce sudden heat. *See, e.g.*, *State v. Payne*, 227 N.W. 258, 261 (Wis. 1929); *State v. Yanz*, 50 A. 37, 39 (Conn. 1901); *Turner v. State*, 708 So. 2d 232, 234 (Ala. Crim. App. 1997). We detect no signs of retreat, however, from the principle that mere words cannot induce sudden heat.

Phillips, based on the trial court's comments at sentencing, contends that the trial court actually found that he had acted in sudden heat but then erroneously concluded that it could not find him guilty of voluntary manslaughter because his trial counsels had not argued that he committed it. Even if all of this is true, however, Phillips is entitled to no relief, because the trial court's ultimate judgment that he committed murder is fully supported by the record, while a finding of sudden heat would not have been.

"[I]t is well established that a decision of the trial court will be sustained if a valid ground exists to support it, whether or not the trial court considered those grounds." *Bruce v. State*, 268 Ind. 180, 201, 375 N.E.2d 1042, 1054 (1978). "[I]n reviewing a judgment on appeal it is the duty of [this] Court to sustain the action of the trial court if it can be done on any legal ground on the record." *Cain v. State*, 261 Ind. 41, 45-46, 300 N.E.2d 89, 92 (1973). "This is true even though the reason given by the trial court might be erroneous, if the ruling can be sustained on another ground." *Id*. at 46, 300 N.E.2d at 92. "[I]f the ruling of the trial court is correct, his stated reason therefor is of no consequence." *Hyde v. State*, 451 N.E.2d 648, 650 (Ind. 1983).

As we have already concluded, the State produced sufficient evidence to establish that Phillips knowingly or intentionally killing Pollard, all the facts necessary to sustain a verdict of guilt for murder. On the other hand, there is no evidence in the record that Phillips was subjected to anything other than words, which cannot, as a matter of law, constitute sufficient provocation to give rise to a finding of sudden heat. *See Matheney*, 583 N.E.2d at 1205. Evidence regarding events that could fairly be characterized as provocative is limited to the

following: Terry testified that he untruthfully told Phillips through a door that Ann was not there and that he repeated the lie twice more on the telephone, Peril testified that she told Phillips at least twice on the telephone that Ann was not there, and Leona told him (in response to his "banging" on the door) to leave or that she would call the police. Not only is there no evidence in the record of anything beyond these words that could be considered provocative, these words themselves do not seem to have been intended to provoke Phillips as much as to protect Ann, who "didn't want to be bothered with him at the time." Tr. p. 171. Although these deceptions and threats may have angered Phillips, they consisted of mere words and were therefore not sufficiently provocative to allow a proper finding of sudden heat. *See Matheney*, 583 N.E.2d at 1205; *Allen*, 716 N.E.2d at 452-53. In summary, even if the trial court found sudden heat and wrongly believed that it could not find Phillips guilty of voluntary manslaughter because his trial counsels did not argue sudden heat,[4] we will affirm his murder conviction because the record contains no evidence of any provocation that can constitute sudden heat as a matter of law.

III. Appropriateness of Phillips's Sentence

Phillips contends that his fifty-year sentence, which is in the lower half of the forty-five-to-sixty-five-year range for murder,[5] is inappropriate. We "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds

[4] We express no opinion and draw no conclusion on the question of whether the trial court did, in fact, misapply the law, as it is not necessary for us to do so.

[5] "A person who commits murder shall be imprisoned for a fixed term of between forty-five (45) and sixty-five (65) years, with the advisory sentence being fifty-five (55) years." Ind. Code § 35-50-2-3(a) (2005).

that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). "Although appellate review of sentences must give due consideration to the trial court's sentence because of the special expertise of the trial bench in making sentencing decisions, Appellate Rule 7(B) is an authorization to revise sentences when certain broad conditions are satisfied." *Shouse v. State*, 849 N.E.2d 650, 660 (Ind. Ct. App. 2006), *trans. denied* (citations and quotation marks omitted).

The nature of Phillips's offense was the brutal slaying of a seemingly blameless victim. Whatever may have occurred between Phillips and the persons in Hill's townhome that evening, and whatever role those occurrences played in causing Phillips to resort to violence, there is no indication that Pollard had any part in provoking Phillips. Of course, we do not mean to suggest that anyone involved would have deserved to die for his or her actions, only that Pollard seemed particularly undeserving of that fate. Whatever provocations and deceptions Phillips may have had to endure, they fall far short of justifying his reaction.

As for Phillips's character, arguably, his history of criminal convictions is relatively minor, consisting of two true findings as a juvenile and one adult conviction for a Class A misdemeanor. Additionally, there is nothing to suggest that Phillips was not a devoted father to the daughter he shared with Ann, and the record further indicates that he cared for Ann's other daughter as well. Finally, we agree with the trial court that Phillips was agitated because he was lied to repeatedly. On the whole, we conclude that the brutality of Phillips's offense is offset by his generally good character, lack of significant criminal record, and the

fact that he was not without some reason to be agitated. In light of the nature of his offense and his character, Phillips's fifty-year sentence is appropriate.

We affirm the judgment of the trial court.

BARNES, J., and CRONE, J., concur.